Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(9)

No. 06-313
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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Petition for Certiorari filed August 29, 2006
Certiorari Granted December 7, 2006

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The following items were printed in the Appendix to Petition for Writ of Certiorari

Transcript of penalty phase closing argument in *State of Missouri v. William L. Weaver*, No. 565118B is located at A-274 of the Appendix to Petition for Writ of Certiorari

Penalty phase jury instructions in *State of Missouri v. William L. Weaver*, No. 565118B (St. Louis County Circuit Court) is located at A-299 of the Appendix to Petition for Writ of Certiorari

Findings of Fact and Conclusions of Law in *William L. Weaver v. State of Missouri*, No. 603615 (St. Louis County Circuit Court Nov. 29, 1994) is located at A-258 of the Appendix to Petition for Writ of Certiorari

Opinion of the Missouri Supreme Court in *State v. Weaver*, No. 71051 (Mo. banc Dec. 19, 1995) is located at A-221 of the Appendix to Petition for Writ of Certiorari

Memorandum & Order in *William Weaver v. Michael Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9,

1999) is located at A-203 of the Appendix to Petition for Writ of Certiorari

Opinion in *William Weaver v. Michael Bowersox*, No. 99-3462 (8th Cir. February 23, 2001) is located at A-187 of the Appendix to Petition for Writ of Certiorari

Memorandum & Order in *William Weaver v. Michael Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) is located at A-23 of the Appendix to Petition for Writ of Certiorari

Opinion in *William Weaver v. Michael Bowersox*, Nos. 03-2880/2938 (8th Cir. February 16, 2006 (corrected February 23, 2006)) is located at A-2 of the Appendix to Petition for Writ of Certiorari

Order Denying Rehearing and Rehearing En Banc in *William Weaver v. Michael Bowersox*, Nos. 03-2880/2938 (8th Cir. May 31, 2006) is located at A-220 of the Appendix to Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2880

WILLIAM WEAVER, Appellee.

v.

MICHAEL BOWERSOX, Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/03	Prisoner Case Docketed Dist. Ct. Office: St. Louis [1668541]
7/24/03	CERTIFIED copies notice of appeal, docket entries, and judgment dated 5/7/03 and amended judgment dated 7/14/03 from district court [03-2880] [1668545]
7/24/03	BRIEFING SCHEDULED: [03-2880] Joint Apndx due on 9/2/03; Aplnt brief due on 9/2/03; Aplee brief due on 10/2/03; Reply brief due on 10/16/03;
7/24/03	RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880]
7/24/03	Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880]
7/24/03	DEATH PENALTY CASE. [03-2880]
7/24/03	CJA 30 voucher issued for appeal. Eric W.

Butts of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellee Voucher #03288001. Nunc Pro Tunc:7/21/03 [03-2880] [1669398]

7/24/03 CJA 30 voucher issued for appeal. Philip M. Horwitz of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellee Voucher #03288002. Nunc Pro Tunc: 7/21/03 [03-2880] [1669399]

7/30/03 APPEARANCE for appellant, attorney Stephen David Hawke [03-2880] [1671219]

8/4/03 CROSS APPEAL BRIEFING SCHEDULE: Appendix due on 9/23/03 in 03-2880, in 03-2938 Aplnt brief due on 9/23/03 in 03-2880, in 03-2938 Aplee/cr. Aplnt brief due on 10/23/03 in 03-2880, in 03-2938 Reply brief of aplnt/cr. aplee due on 11/24/03 in 03-2880, in 03-2938 Reply brf aplee/cr. aplnt due 12/8/03 in 03-2880, in 03-2938 [03-2880, 03-2938]

8/4/03 RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880, 03-2938]

8/4/03 Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880, 03-2938]

9/19/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 10/14/03 . [03-2880, 03-2938] [1688403] w/service 9/18/03

9/19/03	ORDER filed: granting appellant motion for extension of time to file brief [1688403-1] [1688404] in 03-2880, 03-2938 Aplnt brief now due on 10/14/03 in 03-2880, in 03-2938 .
10/10/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/4/03. [03-2880, 03-2938] [1695974] w/service 10/10/03.
10/14/03	ORDER filed: granting appellant motion for extension of time to file brief in 03-2880, 03-2938. [169574-1] [1695976] Aplnt brief and appendix now due on 11/4/03.
11/5/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/14/03. [03-2880, 03-2938] [1704865] w/service 11/4/03.
11/6/03	ORDER filed: granting appellant motion for extension of time to file brief [1704865-1] [1704885] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/14/03 in 03-2880, in 03-2938.
11/14/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/21/03. [03-2880, 03-2938] [1707469] w/service 11/14/03
11/17/03	ORDER filed: granting appellant motion for extension of time to file brief [1707469-1] [1707471] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/21/03 in 03-2880, in 03-2938.

11/21/03 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, to file brief out of time [03-2880, 03-2938] [1710615] w/service 11/21/03

11/25/03 ORDER filed: granting appellant motion to file brief out of time [1710615-1] The Clerk is directed to file appellant's brief as of this date. [1710616] in 03-2880, 03-2938

11/25/03 BRIEF FILED - Brief of Appellant - Michael Bowersox in 03-2880, 03-2938 8,289 words w/addendum 10 copies - w/service 11/24/03 w/disk Defects: no appendix (appendix requested). [03-2880, 03-2938] [1710761]

11/26/03 RECORDS received: Appendix filed by Appellant Michael Bowersox in 03-2880, 03-2938 consisting of 1 Volume(s), 4 Copies [03-2880, 03-2938]

12/19/03 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 1/19/04. [03-2880, 03-2938] w/service 12/15/03

12/19/03 ORDER filed: granting appellee motion extension of time to file second brief. [1718416-1] [1718418] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 1/20/04 in 03-2880, in 03-2938

1/16/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 2/19/04. [03-2880, 03-2938] w/service 1/16/04

1/21/04	ORDER filed: granting appellee motion extension of time to file second brief. [1726976-1] [1726977] in 03-2880, 03-2938, granting appellee motion extension of time to file second brief. [1718416-1] [1726977] in 03-2938, 03-2880 Aplee/cr. aplnt brief now due on 2/19/04 in 03-2880, in 03-2938
2/19/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/4/04. [03-2880, 03-2938] w/service 2/19/04
2/20/04	ORDER filed: granting appellee motion extension of time to file second brief. [1737811-1] [1737815] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 3/4/04 in 03-2880, in 03-2938
3/4/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/15/04. [03-2880, 03-2938] w/service 3/4/04
3/5/04	ORDER filed: granting appellee motion extension of time to file second brief. [1743182-1] [1743183] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. aplnt brief now due on 3/15/04 in 03-2880, in 03-2938
3/19/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, to file brief out of time [03-2880, 03-2938] [1748358] w/service 3/19/04
3/19/04	ORDER filed: granting appellee motion to file brief out of time [1748358-1] The Clerk is directed to file appellee's brief as of this date.

[1748359] in 03-2880, 03-2938

3/19/04 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee William Weaver in 03-2880, 03-2938. 9,766 words - - 10 copies - w/service 3/19/04. w/disk [03-2880, 03-2938] [1748363]

4/20/04 MOTION of aplnt/cross-aplee, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/3/04. [03-2880, 03-2938] w/service 4/19/04.

4/20/04 ORDER filed: granting appellant's motion extension of time to file reply brief (third brief) in 03-2880, 03-2938. [1758898-1] [1758904] Appellant/Cross-Appellee reply brief (third brief) due on 5/3/04

5/3/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/13/04. [03-2880, 03-2938] w/service 5/3/04

5/4/04 ORDER filed: granting appellant motion extension of time to file reply brief [1763394-1] [1763396] in 03-2880, 03-2938 Aplnt/cr. aplee reply brief due on 5/13/04 in 03-2880, in 03-2938

5/26/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1771584] w/service 5/26/04

5/27/04 ORDER filed: granting appellant motion to file brief out of time [1771584-1] The Clerk is

directed to file appellant's reply brief as of this date. [1771592] in 03-2880, 03-2938

5/27/04 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Michael Bowersox in 03-2880, 03-2938. 13 pages - - 10 copies - w/service 5/21/04. w/disk [03-2880, 03-2938] [1771607]

6/1/04 TO SCREENING to rw. [03-2880, 03-2938]

6/3/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 6/18/04 . [03-2880, 03-2938] w/service 6/3/04

6/4/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1774153-1] [1774155] Aplee/cr. Aplnt reply brief now due on 6/18/04 in 03-2880, in 03-2938

6/9/04 RETURNED from Screening (30) [03-2880, 03-2938]

6/18/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file fourth brief until 7/2/04 . [03-2880, 03-2938] w/service 6/18/04

6/22/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1780083-1] [1780086] in 03-2880, 03-2938 Aplee/cr. Aplnt reply brief now due on 7/2/04 in 03-2880, in 03-2938

7/6/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 7/21/04 . [03-2880, 03-2938] w/service 7/6/04

7/8/04 ORDER filed: granting appellee,motion ext. of time to file fourth brief [1785563-1] [1785566] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. Aplnt reply brief now due on 7/21/04 in 03-2880, in 03-2938

7/23/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1792264] w/service 7/23/04

7/27/04 ORDER filed: granting appellee motion to file brief out of time [1792264-1] The Clerk is directed to file appellee/cross-appellant's reply brief as of this date. [1792284] in 03-2880, 03-2938

7/27/04 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - William Weaver in 03-2880, 03-2938 . 10 pages - - 10 copies - w/service 7/23/04 . w/disk [03-2880, 03-2938] [1792287]

8/13/04 *SET FOR ARGUMENT* - September 2004 in St. Louis, Missouri

9/3/04 APPEARANCE for appellee, attorney Eric W. Butts [03-2880] [1807933]

9/13/04 APPEARANCE for appellant, attorney Michael Joseph Spillane [03-2880] [1810142]

9/13/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Pasco M. Bowman, Circuit Judge, Michael J. Melloy, Circuit Judge. Michael Joseph Spillane for Appellant Michael Bowersox in 03-2880. Eric W. Butts for Appellee William

Weaver in 03-2880. Rebuttal by: Michael Spillane. RECORDED. [03-2880, 03-2938]

3/17/05 RECORDS received: Exhibits. Located in: STL, consisting of one box containing 9 folders of respondent's exhibits A - G - which includes state court transcripts and records. [Return to Dist. Ct. at end of case] [03-2880, 03-2938]

2/16/06 THE COURT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. OPINION FILED by Michael J. Melloy, Authoring Judge. PUBLISHED. CONCUR by Kermit E. Bye. CONCUR and DISSENT by Pasco M. Bowman. [03-2880, 03-2938] [2010529]

2/16/06 JUDGMENT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. The judgment of the lower court is AFFIRMED in accordance with the opinion. [03-2880, 03-2938] [2010532]

2/23/06 Opinion CORRECTION. On page 17, in the third line of the second full paragraph, it now reads "ante at 10, 11." On that same page, in the third line of the third paragraph, it now reads "ante at 9"; and on page 18, in the first line, it now reads "ante at 11" and in the sixth line it now reads "at 11 (citing Supreme Court cases at 11-12)." [03-2880, 03-2938]

3/1/06 MOTION of aplnt, Michael Bowersox in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/1/06

3/3/06 ORDER filed: granting appellant motion for ext.

of time to file rehearing [2016314-1] [03-2880, 03-2938] [2016319] in 03-2880, 03-2938

3/7/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/2/06

3/7/06 ORDER filed: granting appellee/cross-appellant motion for ext. of time to file rehearing to 3/16/06 [2017801-1] [03-2880, 03-2938] [2017802] in 03-2880, 03-2938

3/15/06 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowers in 03-2938, for extension of time to file petition for rehearing until 3/30/06. TO COURT w/service 3/15/06

3/16/06 MOTION of aplee, William Weaver in 03-2880, William Weaver in 03-2938, for extension of time to file petition of rehearing until 3/23/06. TO COURT w/service 3/16/06

3/22/06 JUDGE ORDER: granting appellant and appellee motion for ext. of time to file rehearing until March 30, 2006. [2022708-1] [03-2880, 03-2938] [2023773] in 03-2938, 03-2880

3/24/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee/Cross-Appellant William Weaver in 03-2880/03-2938, w/service 3/23/06. TO COURT [03-2880, 03-2938]

3/29/06 MOTION of aplnt/cross-appellee, William Weaver in 03-2880/2938, for extension of time

to file petition for rehearing until 4/3/06. TO COURT w/service 3/29/06

4/3/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant/Cross Appellee Michael Bowersox in 03-2880/2938, w/service 4/3/06. TO COURT [03-2880, 03-2938]

4/4/06 JUDGE ORDER: granting appellant motion for ext. of time to file rehearing to 4/3/06. [2027616-1] [03-2880, 03-2938] [2028744] in 03-2880, 03-2938

4/7/06 Clerk letter sent notifying that parties have an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] in 03-2880/2938, and petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] in 03-2880/2938. [03-2880, 03-2938] Response due by 4/17/06 in 03-2880, in 03-2938

4/14/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/28/06. [03-2880, 03-2938] [2034973] w/service 4/14/06

4/17/06 MOTION of aplnt/cross-appellee, Michael Bowersox in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/24/06. [03-2880, 03-2938] [2034974] w/service 4/17/06

4/19/06 ORDER filed: granting appellee motion extension of time to file response to petition. [2034973-1] [03-2880, 03-2938] [2035047] in 03-2880, 03-2938, granting appellant motion extension of time to file response to petition. [2034974-1] [03-2880, 03-2938] [2035047] in 03-2938, 03-2880 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938

4/27/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 5/3/06. [03-2880, 03-2938] [2039991] w/service 4/27/06

4/28/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] [2040546] in 03-2880/2938. Response filed by Michael Bowersox in 03-2880/2938. w/service 4/28/06. TO COURT [03-2880, 03-2938]

5/2/06 ORDER filed: granting appellee motion extension of time to file response to petition to 5/3/06. [2039991-1] [03-2880, 03-2938] [2039998] in 03-2880, 03-2938 Response to pet. for rehearing due on 5/3/06 in 03-2880, in 03-2938

5/3/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] [2040555] in 03-2880/2938. Response filed by William Weaver in 03-2880/2938. w/service 5/2/06. TO

COURT [03-2880, 03-2938]

5/31/06 JUDGE ORDER: The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Chief Judge Loken, Judge Wollman, Judge Riley, Judge Colloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc. Judge Benton did not participate in the consideration or decision of this matter. [2028766-1] [2050489] [2028760-1] [03-2880, 03-2938] [2050489] in 03-2880, 03-2938 - Published Order.

6/22/06 MANDATE ISSUED [03-2880, 03-2938]

6/23/06 RECEIPT for Mandate. [03-2880, 03-2938] [2062404]

8/9/06 Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 box of Exh.; . [03-2880, 03-2938]

9/11/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 8/29/06. Supreme Ct. Case No.: 06-313 [03-2880, 03-2938] [2090439]

10/17/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 10/4/06. Supreme Ct. Case No.: 06-7089 [03-2880, 03-2938] [2111948]

12/12/06 U.S. Supreme Court order: The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of

certiorari is granted. [2111948-1] [2090439-1] in 03-2880, 03-2938. Order filed in the Supreme Court on 12/7/06 Sup. Ct. No. 06-313 [03-2880, 03-2938]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2938

WILLIAM WEAVER, Appellant,

v.

MICHAEL BOWERSOX, Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
8/4/03	Prisoner Case Docketed Dist. Ct. Office: St. Louis [1671610]
8/4/03	DEATH PENALTY CASE. [03-2938]
8/4/03	CERTIFIED copies of notice of cross-appeal, docket entries, and judgment dated 5/7/03 and order 7/14/03 and amended judgment 7/14/03 from district court [03-2938] [1671615]
8/4/03	CJA 30 voucher issued for appeal. Eric W. Butts in 03-2938 of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellant Voucher #03293801. Nunc Pro Tunc: 7/30/03 [03-2938] [1671617]
8/4/03	CJA 30 voucher issued for appeal. Philip M. Horwitz in 03-2938 of Clayton, MO is hereby appointed under the Criminal Justice Act to represent appellant Voucher #03293802. Nunc Pro Tunc: 7/30/03 [03-2938] [1671618]

8/4/03	CROSS APPEAL BRIEFING SCHEDULE: Appendix due on 9/23/03 in 03-2880, in 03-2938 Aplnt brief due on 9/23/03 in 03-2880, in 03-2938 Aplee/cr. Aplnt brief due on 10/23/03 in 03-2880, in 03-2938 Reply brief of aplnt/cr. aplee due on 11/24/03 in 03-2880, in 03-2938 Reply brf aplee/cr. aplnt due 12/8/03 in 03-2880, in 03-2938 [03-2880, 03-2938]
8/4/03	RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880, 03-2938]
8/4/03	Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880, 03-2938]
8/6/03	APPEARANCE for appellant, attorney Eric W. Butts [03-2938] [1673907]
8/7/03	APPEARANCE for appellee, Stephen David Hawke [03-2938] [1674521]
9/19/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 10/14/03. [03-2880, 03-2938] [1688403] w/service 9/18/03
9/19/03	ORDER filed: granting appellant motion for extension of time to file brief [1688403-1] [1688404] in 03-2880, 03-2938 Aplnt brief now due on 10/14/03 in 03-2880, in 03-2938
10/10/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/4/03 . [03-2880, 03-2938] [1695974]

w/service 10/10/03.

10/14/03 ORDER filed: granting appellant motion for extension of time to file brief in 03-2880, 03-2938 [1695974-1] [1695976] Aplnt brief and appendix now due on 11/4/03.

11/5/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/14/03 . [03-2880, 03-2938] [1704864] w/service 11/4/03

11/6/03 ORDER filed: granting appellant motion for extension of time to file brief [1704865-1] [1704885] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/14/03 in 03-2880, in 03-2938 .

11/14/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/21/03. [03-2880, 03-2938] [1707469] w/service 11/14/03

11/17/03 ORDER filed: granting appellant motion for extension of time to file brief [1707469-1] [1707471] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/21/03 in 03-2880, in 03-2938.

11/21/03 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, to file brief out of time [03-2880, 03-2938] [1710615] w/service 11/21/03

11/25/03 ORDER filed: granting appellant motion to file brief out of time [1710615-1] The Clerk is

directed to file appellant's brief as of this date [1710616] in 03-2880, 03-2938

11/25/03 BRIEF FILED - Brief of Appellant - Michael Bowersox in 03-2880, 03-2938 8,289 words w/addendum 10 copies - w/service 11/24/03 w/disk Defects: no appendix (appendix requested). [03-2880, 03-2938] [1710761]

11/26/03 RECORDS received: Appendix filed by Appellant Michael Bowersox in 03-2880, 03-2938 consisting of 1 Volume(s), 4 Copies. [03-2880, 03-2938]

12/19/03 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 1/19/04. [03-2880, 03-2938] w/service 12/15/03

12/19/03 ORDER filed: granting appellee motion extension of time to file second brief. [1718416-1] [1718418] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 1/20/04 in 03-2880, in 03-2938

1/16/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 2/19/04 . [03-2880, 03-2938] w/service 1/16/04

1/21/04 ORDER filed: granting appellee motion extension of time to file second brief. [1726976-1] [1726977] in 03-2880, 03-2938, granting appellee motion extension of time to file second brief. [1718416-1] [1726977] in 03-2938, 03-2880 Aplee/cr. aplnt brief now due on 2/19/04 in 03-2880, 03-2938

2/19/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/4/04 . [03-2880, 03-2938] w/service 2/19/04

2/20/04 ORDER filed: granting appellee motion extension of time to file second brief. [1737811-1] [1737815] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 3/4/04 in 03-2880, in 03-2938

3/4/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/14/04. [03-2880, 03-2938] w/service 3/4/04

3/5/04 ORDER filed: granting appellee motion extension of time to file second brief. [1743182-1] [1743183] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. aplnt brief now due on 3/14/04 in 03-2880, in 03-2938

3/19/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file brief out of time [03-2880, 03-2938] [1748358] w/service 3/19/04

3/19/04 ORDER filed: granting appellee motion to file brief out of time [1748358-1] The Clerk is directed to file appellee's brief as of this date. [1748359] in 03-2880, 03-2938

3/19/04 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee William Weaver in 03-2880, 03-2938. 9,766 words - - 10 copies - w/service 3/19/04. w/disk [03-2880, 03-2938] [1748363]

4/20/04 MOTION of aplnt/cross-aplee, Michael

Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/3/04. [03-2880, 03-2938] w/service 4/19/04.

4/20/04 ORDER filed: granting appellant's motion extension of time to file reply brief (third brief) in 03-2880, 03-2938. [1758898-1] [1758904] Appellant/Cross-Appellee reply brief (third brief due on 5/3/04.

5/3/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/13/04. [03-2880, 03-2938] w/service 5/3/04

5/4/04 ORDER filed: granting appellant motion extension of time to file reply brief [1763394-1] [1763396] in 03-2880, 03-2938 Aplnt/cr. aplee reply brief due on 5/13/04 in 03-2880, in 03-2938

5/26/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1771584] w/service 5/26/04

5/27/04 ORDER filed: granting appellant motion to file brief out of time [1771584-1] The Clerk is directed to file appellant's reply brief as of this date. [1771592] in 03-2880, 03-2938

5/27/04 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Michael Bowersox in 03-2880, 03-2938. 13 pages - - 10 copies - w/service 5/21/04. w/disk [03-2880, 03-2938] [1771607]

6/1/04 TO SCREENING to rw. [03-2880, 03-2938]

6/3/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 6/18/04 . [03-2880, 03-2938] w/service 6/3/04

6/4/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1774153-1] [1774155] Aplee/cr. Aplnt reply brief now due on 6/18/04 in 03-2880, in 03-2938

6/9/04 RETURNED from Screening (30) [03-2880, 03-2938]

6/18/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file fourth brief until 7/2/04 . [03-2880, 03-2938] w/service 6/18/04

6/22/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1780083-1] [1780086] in 03-2880, 03-2938 Aplee/cr. Aplnt reply brief now due on 7/2/04 in 03-2880, in 03-2938

7/6/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 7/21/04 . [03-2880, 03-2938] w/service 7/6/04

7/8/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1785563-1] [1785566] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. Aplnt reply brief now due on 7/21/04 in 03-2880, in 03-2938

7/23/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file reply brief out of time [03-2880,

03-2938] [1792264] w/service 7/23/04

7/27/04 ORDER filed: granting appellee motion to file brief out of time [1792264-1] The Clerk is directed to file appellee/cross-appellant's reply brief as of this date. [1792284] in 03-2880, 03-2938

7/27/04 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - William Weaver in 03-2880, 03-2938 .10 pages - - 10 copies - w/service 7/23/04 . w/disk [03-2880. 03-2938] [1792287]

8/13/04 *SET FOR ARGUMENT* - September 2004 in St. Louis, Missouri

9/13/04 APPEARANCE for appellee, attorney Michael Joseph Spillane [03-2938] [1810145]

9/13/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Pasco M. Bowman, Circuit Judge, Michael J. Melloy, Circuit Judge. Michael Joseph Spillane for Appellant Michael Bowersox in 03-2880. Eric W. Butts for Appellee William Weaver in 03-2880. Rebuttal by: Michael Spillane. RECORDED. [03-2880, 03-2938]

3/17/05 RECORDS received: Exhibits, Located in: STL, consisting of one box containing 9 folders of respondent's exhibits A - G - which includes state court transcripts and records. [Return to Dist. Ct. at end of case] [03-2880, 03-2938]

2/16/06 THE COURT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. OPINION FILED

by Michael J. Melloy, Authoring Judge. PUBLISHED. CONCUR by Kermit E. Bye. CONCUR and DISSENT by Pasco M. Bowman [03-2880, 03-2938] [2010529]

2/16/06 JUDGMENT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. The judgment of the lower court is AFFIRMED in accordance with the opinion. [03-2880, 03-2938] [2010532]

2/23/06 Opinion CORRECTION. On page 17, in the third line of the second ful paragraph, it now reads "ante at 10, 11." On that same page, in the third line of the third paragraph, it now reads "ante at 9"; and on page 18, in the first line, it now reads "ante at 11" and in the sixth line it now reads "at 11 (citing Supreme Court cases at 11-12)." [03-2880, 03-2938]

3/1/06 MOTION of aplnt, Michael Bowersox in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/1/06

3/3/06 ORDER filed: granting appellant motion for ext. of time to file rehearing [2016314-1] [03-2880, 03-293] [2016319] in 03-2880, 03-2938

3/7/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/2/06

3/7/06 ORDER filed: granting appellee/cross-appellant motion for ext. of time to file rehearing to 3/16/06 [2017801-1] [03-2880, 03-2938]

[2017802] in 03-2880, 03-2938

3/15/06 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, for extension of time to file petition for rehearing until 3/30/06. TO COURT w/service 3/15/06

3/16/06 MOTION of aplee, William Weaver in 03-2880, William Weaver in 03-2938, for extension of time to file petition for rehearing until 3/23/06. TO COURT w/service 3/16/06

3/22/06 JUDGE ORDER: granting appellant and appellee motion for ext. of time to file rehearing until March 30, 2006. [2022708-1] [03-2880, 03-2938] [2023773] in 03-2938, 03-2880

3/24/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee/Cross-Appellant William Weaver in 03-2880/03-2938, w/service 3/23/06. TO COURT [03-2880, 03-2938]

3/29/06 MOTION of aplnt/cross-appellee, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 4/3/06. TO COURT w/service 3/29/06

4/3/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant/Cross-Appellee Michael Bowersox in 03-2880/2938, w/service 4/3/06. TO COURT [03-2880, 03-2938]

4/4/06 JUDGE ORDER: granting appellant motion for ext. of time to file rehearing to 4/3/06.

[2027616-1] [03-2880, 03-2938] [2028744] in 03-2880, 03-2938

4/7/06 Clerk letter sent notifying that parties have an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] in 03-2880/2938, and petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] in 03-2880/2938. [03-2880, 03-2938] Response due by 4/17/06 in 03-2880, in 03-2938

4/14/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/28/06. [03-2880, 03-2938] [2034973] w/service 4/14/06

4/17/06 MOTION of aplnt/cross-appellee, Michael Bowersox in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/24/06. [03-2880, 03-2938] [2034974] w/service 4/17/06

4/19/06 ORDER filed: granting appellee motion extension of time to file response to petition. [2034973-1] [03-2880, 03-2938] [2035047] in 03-2880, 03-2938, granting appellant motion extension of time to file response to petition. [2034974-1] [03-2880, 03-2938] [2035047] in 03-2938, 03-2880 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938

4/27/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 5/3/06. [03-2880, 03-2938] [2039991] w/service 4/27/06

4/2806 RESPONSE to petition for REHEARING with petition for rehearing en banc filed by William Weaver [2028760-1] [2040546] in 03-2880/2938. Response filed by Michael Bowersox in 03-2880/2938. w/service 4/28/06. TO COURT [03-2880, 03-2938]

5/2/06 ORDER filed: granting appellee motion extension of time to file response to petition to 5/3/06. [2039991-1] [03-2880, 03-2938] [2039998] in 03-2880, 03-2938 Response to pet. for rehearing due on 5/3/06 in 03-2880, in 03-2938

5/3/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] [2040555] in 03-2880/2938. Response filed by William Weaver in 03-2880/2938. w/service 5/2/06. TO COURT [03-2880, 03-2938]

5/31/06 JUDGE ORDER: The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Chief Judge Loken, Judge Wollman, Judge Riley, Judge Colloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc. Judge Benton did not participate in the consideration or decision of this matter. [2028766-1] [2050489] [2028760-1] [03-2880,

03-2938] [2050489] in 03-2880, 03-2938 - Published Order.

6/22/06 MANDATE ISSUED [03-2880, 03-2938]

6/23/06 RECEIPT for Mandate. [03-2880, 03-2938] [2062404]

8/9/06 Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 box of Exh; . [03-2880, 03-2938]

9/11/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 8/29/06. Supreme Ct. Case No.: 06-313 [03-2880, 03-2938] [2090439]

10/17/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 10/4/06. Supreme Ct. Case No.: 06-7089 [03-2880, 03-2938] [2111948]

12/12/06 U.S. Supreme Court order: The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. [2111948-1] [2090439-1] in 03-2880, 03-2938. Order filed in the Supreme Court on 12/7/06 Sup. Ct. No. 06-313 [03-2880, 03-2938]

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI

No. 4:96-CV-2220 CAS

WILLIAM WEAVER, Petitioner,

v.

MICHAEL BOWERSOX, Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/12/1996	PETITION FOR WRIT OF HABEAS CORPUS by petitioner William Weaver (KLK) (Entered: 11/13/1996)
11/12/1996	MOTION by petitioner William Weaver for appointment of counsel (KLK) (Entered: 11/13/1996)
11/13/1996	LETTER to petitioner re: case filed (KLK) (Entered: 11/13/1996)
11/18/1996	RESPONSE by respondent Michael Bowersox to motion for appointment of counsel [2-1] (CQL) (Entered:11/21/1996)
11/27/1996	CASE MANAGEMENT ORDER by Honorable Charles A. Shaw: administrative (4) track,; Petitioner to file petition by 5/27/97 and any motion for evidentiary hearing and supporting documents by 5/27/97; Respondent shall file a response to amended petition/hearing by 7/12/97 and petitioner shall file his traverse/reply by

8/27/97 (cc: all counsel) (CQL) (Entered: 12/03/1996)

11/27/1996 ORDER by Honorable Charles A. Shaw granting motion for appointment of counsel [2-1] Philip M. Horwitz, Eric W. Butts are appointed as petitioners counsel: complete copy of file sent to appointed counsel. (cc: all counsel) (CQL) (Entered: 12/03/1996)

01/24/1997 ORDER GRANTING LEAVE TO PROCEED EX PARTE ON A SEALED RECORD REGARDING EXPERT AND INVESTIGATIVE ASSISSSTANCE (SEE ORDER) by Honorable Charles A. Shaw (cc: all counsel) (CQL) (Entered: 01/29/1997)

02/11/1997 EX-PARTE MOTION by petitioner William Weaver for order for interim payment of fees to appointed counsel (MRC) (Entered: 04/15/1997)

04/11/1997 ORDER by Honorable Charles A. Shaw - It Is Ordered that petitioner's motion that this court consider a request for interim payments of fees and costs is granted; and petitioner may file vouchers every 2 months with the Clerk of the Court seeing payment of fees and expenses. (granting motion for order for interim payment of fees of appointed counsel [8-1] (cc: all counsel) (MRC) (Entered: 04/15/1997)

04/11/1997 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw - The court will allow counsel to obtain interim payment of fees and expenses...If counsel desires additional clarification concerning payments under the

CJA. counsel should address inquiries to the Clerk of the Court. SO ORDERED. (cc: all counsel) (MRC) (Entered: 04/15/1997)

05/20/1997 RETURN LETTER from Clerk to Petitioner re: req. for ext of time to file an amended petition (SET) (Entered: 05/21/1997)

05/22/1997 MOTION by petitioner William Weaver to extend time thru 6/27/97 to file his amended petition. (CQL) (Entered: 05/27/1997)

05/22/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time thru 6/27/97 to file his amended petition. [12-1] (cc: all counsel( )CQL) (Entered: 05/27/1997)

05/30/1997 CJA Form 30 (Attorney Payment Voucher) paid to Phillip Horwitz, in the amount of $6,079.5, and recorded on voucher number D44824 as to petitioner William Weaver (SET) (Entered: 06/02/1997)

06/27/1997 AMENDED PETITION FOR WRIT OF HABEAS CORPUS by petitioner William Weaver (CQL) (Entered: 05/10/1999)

06/27/1997 MOTION by petitioner William Weaver for evidentiary hearing on pltffs amended petition (CQL) (Entered: 07/01/1997)

06/27/1997 GENERIC SCHEDULING EVENT ; Dispositive Motion ddl satisfied (CQL) (Entered: 07/01/1997)

07/03/1997 CJA From 30 (Attorney Payment Voucher

Death Penalty) paid to Philip Horwitz, in the amount of $3,173.50, and recorded on voucher number D44824 (CQL) (Entered: 07/08/1997)

08/05/1997 CJA Form 30 (Attorney Payment Voucher) paid to Eric Butts, in the amount of $5,061.00, and recorded on voucher number 44838 as to petitioner William Weaver (SET) (Entered: 08/08/1997)

08/07/1997 MOTION by respondent Michael Bowersox to extend time to respond til 8/26/97 (FCE) (Entered: 08/14/1997)

08/11/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to respond til 8/26/97 [0-1] (cc: all counsel) (FCE) (Entered: 08/14/1997)

08/28/1997 MOTION by respondent Michael Bowersox to extend time to answer (PGD) (Entered: 09/11/1997)

09/08/1997 RESPONSE to order show cause by respondent Michael Bowersox [5-2], [1-1] with exhibit A Attached. (CQL) (Entered: 09/09/1997)

09/08/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to answer [19-1] (cc: all counsel) (PGD) (Entered: 09/12/1997)

09/11/1997 MOTION by respondent Michael Bowersox for leave to file supplemental response to order to show cause why a writ of habeas corpus should not be granted (MRC) (Entered: 09/16/1997)

09/11/1997 RULED DOCUMENT by Honorable Charles A. Shaw - LEAVE GRANTED (CAS). granting respondent's motion for leave to file supplemental response to order to show cause why a writ of habeas corpus should not be granted [20-1] (cc: all counsel) (MRC) (Entered: 09/16/1997)

09/11/1997 SUPPLEMENTAL by respondent Michael Bowersox re response to order to show cause why a writ of habeas corpus should not be granted [18-1] (MRC) (Entered: 09/16/1997)

09/22/1997 MEMORANDUM (Respondent's Exhibits A-E in 9 folders to Show cause response) by respondent Michael Bowersox re: [21-1], re: response [18-1] (CQL) (Entered: 09/23/1997)

10/14/1997 MOTION by petitioner William Weaver to extend time to file travers (GLF) (Entered: 10/17/1997)

10/14/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to file traverse [23-1] cc: all counsel) (GLF) (Entered: 10/17/1997)

11/03/1997 CJA Form 30 (Attorney Payment Voucher) paid to Philip Horwitz, in the amount of $1,795.50, and recorded on voucher number D44824 as to petitioner William Weaver (CQL) (Entered: 11/07/1997)

11/18/1997 MOTION by petitioner William Weaver to extend 45 days to file travers (SET) (Entered: 11/25/1997)

11/18/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend 45 days to file traverse [25-1] (cc: all counsel) (SET) (Entered: 11/25/1997)

01/05/1998 TRAVERSE by petitioner William Weaver to [18-1] (GLF) (Entered: 01/07/1998)

02/27/1998 LETTER from petitioner William Weaver's sister re: review file (SET) (Entered: 02/27/1998)

03/13/1998 ORDER NUNC PRO TUNC by Honorable Charles A. Shaw denying motion for evidentiary hearing: Further Ordered that order dated 3/12/98 in cause #4:96CV774 CAS is vacated, and the Clerk of the Court is hereby ordered to remove the order from the Court file. [14-1] (cc: all counsel) (CQL) (Entered: 03/18/1998)

02/10/1999 GENERIC SCHEDULING EVENT ; Response to Court ddl satisfied (CQL) (Entered: 02/10/1999)

08/09/1999 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw granting habeas corpus motion AMENDED PETITION FOR WRIT OF HABEAS CORPUS [15-1], granting habeas corpus motion [15-2], terminating habeas corpus motion PETITION FOR WRIT OF HABEAS CORPUS [1-1] IT IS FURTHER ORDERED that William Weaver's request for evidentiary hearing is DENIED as moot. IT IS FURTHER ORDERED that the Judgement and Sentencing in the State of Missouri v. Weaver Cause No. 565118B is Vacated. If the State of

Missouri elects to retry William Weaver it must file a notice of intention to do so prior to September 27, 1999. (Cc: all counsel) (JWJ) (Entered: 08/09/1999)

08/09/1999 WRIT OF HABEAS CORPUS: by Honorable Charles A. Shaw IT IS HEREBY ORDERED, ADJUDGED and DECREED that William Weaver is GRANTED this Writ of Habeas Corpus. IT IS FURTHER ORDERED, ADJUDGED and DECREED that if the State of Missouri elects to retry William Weaver, it shall file a motion of its intention to do so prior to September 27, 1999. (Three (3) certified copies forwarded to thr U.S. Marshal Service) terminating case (cc: all counsel) (JWJ) (Entered: 08/09/1999)

09/07/1999 NOTICE OF APPEAL filed by respondent Michael Bowersox re: the District Court decision ; [30-2] fee: $105.00 (CQL) (Entered: 09/08/1999)

09/07/1999 RECEIPT # S99-9071 in the amount of $ 105.00 for Appeal/Docket fee (CQL) (Entered: 09/08/1999)

09/10/1999 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet. 2 Certified Copies of Notice of Appeal filed by Respondent, 2 Certified Copies of Clerk's Docket entries and 2 copies of ORDER RE WRIT OF HABEAS CORPUS/MEMO/ORDER (CAS) file 8/9/99. Copy of NOA to Judge Shaw. cc: NOA, Clerk's docket entries and USCA letter to parties. (FCE) (Entered: 09/10/1999)

09/21/1999 MOTION by respondent Michael Bowersox to stay orders and judgement with: Exhibit A attached. (CQL) (Entered: 09/22/1999)

09/23/1999 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to stay orders and judgment [33-1] (cc: all counsel) (JWJ) (Entered: 09/23/1999)

09/23/1999 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #: 99-3462 Mthd of Appndx Prep Due: 10/4/99 Transcript Due: n/a Designations Due: 10/4/99&10/13/99 Briefs Due: 11/2/99&12/2/99&12/16/99 (MRC) (Entered: 09/27/1999)

09/23/1999 LETTER from USCA: to previous counsel, Eric Butts USCA # 99-3462 re: appointment to represent appellant as co-counsel (MRC) (Entered: 09/27/1999)

09/23/1999 LETTER from USCA: to previous counsel for petitioner/appellant, Phillip Horwitz USCA # 99-3462 re: appointment as counsel for party under death penalty (MRC) Modified on 09/27/1999 (Entered: 09/27/1999)

09/24/1999 RESPONSE to Court Order Of August 9, 1999 by respondent Michael Bowersox to [29-1] (MRC) (Entered: 09/27/1999)

04/24/2000 CJA Form 30 (Attorney Payment Voucher) paid to Phillip Horwitz, in the amount of $12,337.50, and recorded on voucher number 53268 as to petitioner William Weaver (JWJ) (Entered: 05/10/2000)

02/26/2001 Opinion from USCA on USCA number 99-3462 Opinion of USCA: reverse/remand (CQL) (Entered: 02/28/2001)

03/14/2001 ORDER FROM USCA copy filed USCA number: 99-3462 Appellants motion for rehearing has been considered by the court and is granted. Appellant may have to 4/27/01 to file the petition for rehearing. (JWJ) (Entered: 03/19/2001)

05/09/2001 LETTER from USCA to MO Atty Gen Office re: USCA # 99-3462 requesting 21 copies of their response to petitioner's appeal by 5/18/01. (FCE) (Entered: 05/10/2001)

05/31/2001 ORDER FROM USCA copy filed USCA number: 99-3462 The appellant's motion for an extension of time within which to respond to appellee's petition for rehearing is granted to 6/8/01. No further extensions will be granted. (FCE) (Entered: 06/01/2001)

06/29/2001 ORDER FROM USCA copy filed USCA number: 99-3462 the petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied (JWJ) (Entered: 07-03-2001)

07/13/2001 MANDATE W/OPINION ATTACHED from (USCA) reversing and remanding the Decision of the District Court [Appeal [31-1]] USCA number: 99-3462 (cc: all counsel) (JWJ) (Entered: 07/16/2001)

05/07/2003 MEMORANDUM AND ORDER: by

Honorable Charles A. Shaw - IT IS HEREBY ORDERED that petitioner Weaver's first amended petition for writ of habeas corpus is GRANTED as to the sentence of death only, based on portions of claim two ..., and DENIED in all other respects. Weaver's death penalty is vacated, and he must either be sentenced to life in prison without the possibility of parole or must be given a new trial on the state's request for the death penalty. IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability. An appropriate judgement will accompany this memorandum and order. granting habeas corpus motion AMENDED PETITION FOR WRIT OF HABEAS CORPUS [15-1] (cc: all counsel) (MRC) (Entered: 05/08/2003)

05/07/2003 JUDGMENT: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner William Weaver's first amended petition for writ of habeas corpus pursuant to 28 USC 2254 is GRANTED as to the sentence of death, based on portions of claim two, and DENIED on all other claims. IT IS FURTHER ORDERED that petitioner has not made a substantial showing of the denial of a constitutional right.....therefore this Court will not issue a certificate of appealability. for petitioner William Weaver against respondent Michael Bowersox terminating case (cc: all counsel) (MRC) (Entered: 05/08/2003)

05/08/2003 SUPPLEMENTAL Response to Order to Show Cause Why A Writ of Habeas Corpus Should

Not Be Granted with Exhibit H-Affidavit of Helen Bode attached by respondent Michael Bowersox re response [18-1] (MRC) (Entered: 05/09/2003)

05/21/2003 MOTION by petitioner William Weaver to alter, amend, or to set aside judgment under Rule 59(e). (KXS) (Entered: 05/21/2003)

06/03/2003 MOTION by respondent Michael Bowersox to extend time in which to file suggestions in opposition to the motion to alter or amend judgment up to and including 6/12/03 (JWJ) (Entered: 06/04/2003)

06/03/2003 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time in which to file suggestions in opposition to the motion to alter or amend judgment up to and including 6/12/03 [50-1] (cc: all counsel) (JWJ) (Entered: 06/04/2003)

06/12/2003 MOTION by respondent Michael Bowersox to extend time in which to file suggestions in opposition to motion to alter or amend judgment up to and including June 19, 2003 (KXS) (Entered: 06/16/2003)

06/16/2003 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time in which to file suggestions in opposition to motion to alter or amend judgment up to and including June 19, 2003 [52-1] GRANTED (cc: all counsel) (KXS) (Entered: 06/16/2003)

06/18/2003 RESPONSE by respondent Michael Bowersox

to motion to alter [49-1], to motion amend [49-2], to motion to set aside judgment [49-3] (JWJ) (Entered: 06/20/2003)

07/14/2003 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED that petitioner's motion to alter, amend or set aside judgment under Rule 59(e) is granted in part and denied in part; said motion is granted to the extent the Court will issued a certificate of appealability as to Claims 2.B and 2.C of the first amended petition for writ of habeas corpus and is denied in all other respects. IT IS FURTHER ORDERED that an amended judgment will accompany this memorandum and order, granting in part and denying in part morion to alter [49-1], granting in part and denying in part motion amend [49-2], granting and denying in part motion to set aside judgment [49-3] (cc: all counsel) (MRC) (Entered: 07/15/2003)

07/14/2003 AMENDED JUDGMENT: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner William Weaver's first amended petition for writ of habeas corpus pursuant to 28 USC 2254 is granted as to the sentence of death, based on portions of claim two and denied on all other claims. IT IS FURTHER ORDERED that petitioner established that this Court's resolution of Claims 2.B and 2.C is debatable among jurists of reason and therefore the Court will issue a certificate of appealability on Claims 2.B and 2.C. IT IS FURTHER ORDERED that with respect to the remaining claims, petitioner has

not made a substantial showing of the denial of a constitutional right.....and therefore this Court will not issue a certificate of appealability on those claims.(cc: all counsel) (MRC) (Entered: 07/15/2003)

07/21/2003 NOTICE OF APPEAL filed by respondent Michael Bowersox re: the District Court decision ; [47-2], [46-1], [56-1], [55-1] fee $ 105.00 paid (KXS) (Entered: 07/22/2003)

07/21/2003 RECEIPT # S2003-009484 in the amount of $ 105.00 for appeal (KXS) (Entered: 07/22/2003)

07/23/2003 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet. 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries, Memo & Order (Hon. CAS) filed on 5/7/03, judgment (Hon. CAS) filed on 5/7/03, Memo & Order (Hon. CAS) filed on 7/14/03 and Amended judgment (Hon. CAS) filed on 7/14/03 re: 1st Amended petition for Writ of Habeas Corpus 28 USC 2254 is GRANTED and Non-issuance of Certificate of Appealability. cc: NOA to Hon. CAS. cc: NOA and Clerk's docket entries to parties. (CF) (Entered: 07/23/2003)

07/23/2003 Transmittal Acknowledgment from USCA I, II file volumes, transcript volumes (JWJ) (Entered: 07/24/2003)

07/24/2003 FILE RETURNED # of volumes; 2 re appeal [57-1] (KXS) (entered: 07/28/2003)

07/25/2003 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #. 03-2880

Mthd of Appndx Prep Due: 10 days from today Transcript Due: N/A Designations Due: 10 days from today Briefs Due: aplnt 9/2/03; aplee 10/2/03; reply 10/16/03. (KXS) (Entered: 07/28/2003)

07/30/2003 NOTICE OF APPEAL filed by petitioner William Weaver re: the District Court decision; [56-1], [55-1], [47-2], [46-1] fee S IFP Status (MRC) (Entered: 07/31/2003)

07/31/2003 REMARK - Petitioner's notice of appeal, court file and docket entries forwarded to OSU for processing of appeal. (MRC) (Entered: 07/31/2003)

08/01/2003 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries, Judgment (Hon. CAS) filed on 5/7/03 GRANTED 28 USC 2254, Memo & Order (Hon. CAS) filed on 7/14/03 and Amended Judgment (Hon. CAS) filed on 7/14/03 Non-issuance of Certificate of Appealability. Cc: NOA to CAS. cc: NOA and Clerk's docket entries to parties. (CF) (Entered: 08/01/2003)

08/01/2003 Transmittal Acknowledgment from USCA 2 file volumes, none transcript volumes USCA number: 99-3462 (JWJ) (Entered: 08/04/2003)

08/01/2003 ENTIRE FILE SENT TO (USCA) - # of Volumes: 2 (KXS) (Entered: 08/06/2003)

08/05/2003 FILE RETURNED # of volumes; 2 re appeal [62-1], re appeal [57-1] (counsel appointed)

(KXS) (Entered: 08/06/2003)

03/16/2005 Appeal Transmittal re [62] Notice of Appeal, [57] Notice of Appeal: The following has been forwarded to USCA: transcripts E01 through E09(LGK.) (Entered: 03/17/2005)

03/17/2005 Appeal Remark - transcript folders #E01- E09 received by USCA(KXS,) (Entered: 03/18/2005)

02/16/2006 OPINION from USCA re [57] Notice of Appeal, [62] Notice of Appeal: USCA Appeal #: 03-2880-2938 affirmed (KXS,) (Entered: 03/01/2006)

02/17/2006 OPINION from USCA re [57] Notice of Appeal, [62] Notice of Appeal: USCA Appeal #: 03-2880-2938 affirmed (KXS,) (Entered: 02/17/2006)

02/17/2006 ORDER RECEIPT: (see receipt) Fri Feb 17 10:01:17 CST 2006 (KXS,) (Entered: 02/17/2006)

03/01/2006 ORDER RECEIPT: (see receipt) Wed Mar 1 11:36:42 CST 2006 (KXS,) (Entered: 03/01/2006)

05/31/2006 ORDER of USCA USCA Appeal #. 03-2880/2938 Petitions for rehearing en banc are denied. Petitions for rehearing by panel are also denied. Chief Judge Loken and Judges Wollman, Riley, Colloton, and Gruender would grant petitioner for rehearing en banc. (KXS,) (Entered: 06/01/2006)

06/22/2006 MANDATE of USCA as to [57] Notice of Appeal filed by Michael Bowersox., [62] Notice of Appeal filed by William Weaver. Decision of USCA: Affirmed USCA #.03-2880/2938(KXS.) (Entered: 03/23/2006)

06/22/2006 OPINION from USCA re [57] Notice of Appeal. [62] Notice of Appeal: USCA Appeal #: 03-2880/2938 Affirmed (KXS,) (Entered: 06/23/2006)

08/11/2006 Appeal Remark USCA Appeal #. 03/2880 1 box exhibits returned to USDC from USCA(KXS,) (Entered: 08/14/2006)

09/19/2006 LETTER from USCA regarding writ of certiorari filed with the U.S. Supreme Court (MRC,) (Entered: 09/20/2006)

11/27/2006 ORDER of USCA Regarding: The petition for writ of certiorari being filed USCA Appeal #:06-7089 (JWJ,) (Entered: 11/29/2006)

Excerpt from Mr. Weaver's brief on consolidated appeal to the Missouri Supreme Court, pages 59 to 69. The entire brief was submitted on September 11, 1997 to district court as Respondent's Exhibit E.

In the
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
Respondent,	)	
	)	
vs.	)	No. 71051
	)	
WILLIAM WEAVER,	)	
Appellant.	)	

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

* * *

[59] **IV. WESTFALL'S IMPROPER ARGUMENTS**

Throughout guilt and penalty phase arguments, Westfall urged the jury to convict and impose death because, as the elected prosecuting attorney, he would not have charged Mr. Weaver and sought death unless he was guilty and deserved that punishment. During guilt and penalty phases, Westfall argued defense counsel had suborned perjury and fabricated the misidentification defense. Westfall made arguments that appealed to the jurors' personal fears, represented that he could have presented victim impact evidence, and suggested he had special knowledge of matters outside the evidence. Westfall's arguments deprived Mr. Weaver of his Federal and State Constitutional rights to due process and freedom from cruel and unusual punishment. Additionally, counsel failed to object to some of Westfall's improper arguments, and thereby, deprived Mr. Weaver of his right to effective assistance of counsel

guaranteed under the Federal and State Constitutions. Finally, Westfall's arguments also facially constituted prosecutorial misconduct.

This Court has recognized that "[i]t is a fundamental concept of the criminal law that an accused. . . . is entitled to a fair trial, and so it is the duty of the trial court, and of prosecuting counsel as well, to see that he gets one, and there must be no conduct by argument or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury against him." State v. Tiedt, 206 S.W.2d 524, 526 (Mo. banc 1947). See also, State v. Storey, No. 74425, slip op. at 25 (Mo. banc Jun. 20, 1995) (prosecutor's duty is to "serve justice, not just win the case"). Prosecutors are prohibited from injecting into the jurors' minds "any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." Tiedt, 206 S.W.2d at 527. To be entitled to plain error relief under Rules 29.12 and 30.20, a defendant must "go beyond a mere showing of demonstrable prejudice to show manifest [60] prejudice affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc 1989).

This Court's review of the motion court's ruling is limited to determining whether it clearly erred. State v. White, 798 S.W.2d 694, 697 (Mo. banc 1990). A defendant's right to effective assistance of counsel is violated if counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). The first amended motion alleged counsel was ineffective for failing to object to Westfall's guilt and penalty arguments which independently constituted prosecutorial misconduct because he: (1) represented he only brought charges and sought the death penalty in cases warranting such treatment; (2) attacked defense

counsel's integrity; (3) appealed to the jurors' personal fears; and (4) suggested he had special knowledge of matters outside the evidence (R.L.F. 160, 164-65). The motion court rejected these claims concluding that all of Westfall's arguments were proper (R.L.F. 1035-36).

This Court has recognized that a prosecutor's statement of personal opinion during argument transforms the prosecutor into an unsworn witness. State v. Storey, slip op. at 25-26 (Mo. banc Jun. 20, 1995). When a prosecutor makes such arguments, it is prejudicial because the jury properly believes the prosecutor has a duty to serve justice and not to merely win the case. Id. at 26. Westfall engaged in the same type of conduct as the prosecutor in Storey and reversal is required here as well.

A. Position As The Elected Prosecutor

The decision to impose death must be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 358 (1977). In Newlon v. Armontrout, 693 F.Supp. 799 (W.D. Mo. 1988), aff'd., Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), the defendant's death sentence was vacated because Westfall made the same improper arguments there that he again made here (R. Tr. 115). Representations that the prosecutor's office only seeks the death penalty in cases deserving the death penalty are irrelevant and prejudicial. Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985). Such argument is prejudicial because it is similar to argument that "we only [61] prosecute the guilty." Id. Argument that the prosecutor's office only prosecutes the guilty cannot be cured even with an instruction to disregard. State v. Evans, 820 S.W.2d 545, 547-548 (Mo. App., E.D. 1991).

During guilt phase rebuttal, Westfall argued:

Come on. All these coincidences, you can't believe it. It's nonsense. If you don't believe the State's case here, you twelve people would never convict anybody.

MS. BLACK: Objection, Your Honor. That is totally improper to give that kind of threat to the jury.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard it.

THE COURT: The last comment of Mr. Westfall will be stricken. The jury is ordered to disregard that statement.

(Tr. 1710) (emphasis added).

Westfall's initial penalty argument included:

I can't emphasize too much don't second-guess your verdict in that regard. It was the right verdict and you know it and you're comfortable with it. Now, the only decision is should his life be spared. And I say to you: Why should it be? When you were selected as jurors, you all said, yes, in the right case I can give the death penalty. And one or two of you even said you would favor the death penalty in the right case. Well, if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it

in? So if you were being honest to me when you said that, then that has to be the case.

MS. BLACK: Objection, Your Honor. That calls for improper argument. May we approach the bench, please?

MR. WESTFALL: Judge, would you save my time? (Counsel approached the bench and the following proceedings were had:)

MS. BLACK: I object to the State using this somewhat threatening statement to the jury that if they don't come back with death in this particular case, then there's no other case that they could come back with a death for and would come back with death for. I think it's improper argument to this jury. It is intended to impose fear and intimidation on this jury into arriving at a verdict of death. And I ask this jury - - the judge to sustain the objection and instruct the jury to disregard his last comment and to admonish counsel against making those kinds of comments to the jury.

MR. WESTFALL: Judge, I'm simply speaking hypothetically that if this isn't the case that calls for a death penalty, what type of case would?

THE COURT: I'll overruled the objection.

(The proceedings returned to open court).

[62] MR. WESTFALL: If this isn't a

> case that calls for the death penalty. I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case.

(Tr. 1761-62) (emphasis added).

* * * *

> "I mean if this isn't the case for the death penalty, then there's no case you'll do it."

(Tr. 1765) (emphasis added).

Westfall's penalty rebuttal argument continued:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

(Tr. 1778) (emphasis added). The trial court again sustained an objection and directed the jury to disregard the argument (Tr. 1778).

Westfall's penalty rebuttal continued:

> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law

> enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

(Tr. 1781-82) (emphasis added). Once again, an objection was sustained and the jury instructed to disregard (Tr. 1782). Finally, Westfall's rebuttal argument continued:

> MR. WESTFALL: Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.
>
> MS. BLACK: Objection, Your Honor. This is improper closing, to inflame and prejudice this jury by using that example in that particular movie.

[63] MR. WESTFALL: Judge, it's just an analogy.

THE COURT: Overruled.

(Tr. 1782-83) (emphasis added).

In Newlon, Westfall repeatedly made these same arguments, without objection, and the death sentence was still vacated. Newlon, 885 F.2d 1339-40, 1342. The prejudice to Mr. Weaver was not cured even when objections were sustained and instructions to disregard were given. See State v. Evans, supra. Westfall's conduct in Mr. Weaver's case is especially egregious because when he tried Mr. Weaver's case he knew that Newlon's sentence had been vacated based on these same improper arguments (R. Tr. 154-56; Ex. 8 at 54-55). It is not surprising that Westfall would display such a cavalier disregard for this State's judiciary, especially in light of his conduct that gave rise to this Court's decision in In the Matter of Westfall, 808 S.W.2d 829 (Mo. banc 1991). In Newlon, the District Court declined to consider hearsay testimony that Westfall had made statements at a tavern, in the presence of his assistants, that he intended to "'let it all hang out'" during penalty phase argument. Newlon, 693 F.Supp. at 808 n.4. However, the District Court, in reviewing Westfall's argument, concluded "he did, in fact, 'let it all hang out.'" Id. This Court should similarly find Westfall again improperly "let it all hang out" in his guilt and penalty arguments.

In Storey, this Court found the prosecutor's argument that the homicide was one of the most brutal killings in St. Charles County's history was improper. Storey, slip op. at 24-25. That argument was improper because there was no evidence about the brutality of other murders in St. Charles County and constituted unsworn testimony by the prosecutor. Id. Here, Westfall made a similar argument that was even

more egregious than the Storey argument. Westfall's opinion argument was worse because he told the jury that Mr. Weaver's case when it was compared to all other homicides, not just those in St. Louis County, warranted death. Cf. Antwine v. Delo, 54 F.3d 1357, 1360-64 (8th Cir. 1995) (no evidence in record to support prosecutor's argument death penalty would be imposed "instantaneously" so as to be quick, painless, and humane). There was no evidence of all other homicides demonstrating why Mr. Weaver's case, above all others, required death.

[64]**B. Attacks On Defense Counsel**

Prosecutorial argument implying defense counsel suborned perjury and fabricated the defense is patently improper. State v. Harris, 662 S.W.2d 276, 277 (Mo. App., E.D. 1983). See also, State v. Burnfin, 771 S.W.2d 908, 912-13 (Mo. App., W.D. 1989) (argument defense counsel spent two days attempting to hide the truth improper). A much repeated theme of Westfall's argument was counsel suborned perjury and fabricated Mr. Weaver's defense.

> During initial guilt phase, without objection, Westfall argued:
>
> He and Daryl Shurn went there to kill Charles Taylor and they succeeded. It didn't go the way they wanted it to go or he wouldn't be sitting here right now, but they succeeded. Charles Taylor is dead and he's been in the grave a little over a year now. And now, of course, Mr. Weaver is here lying to you and telling you that he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black - - who is just about as capable of a defense attorney as you're going to find in these cases - - that enough confusion, enough

> smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt. But it's murder First Degree or it's nothing. The other charge, Murder Second Degree, that's an option under the law, but it's not there under the facts and you know it, so don't do it.

(Tr. 1645) (emphasis added). Westfall's argument, this time over objection, continued:

> You know, as we went through the trial, it was sort of like the Doris Black show. I'm the Prosecutor. I put on the witnesses. I elicit from them or ask the questions I need to have answered in order to prove what I think is a submissible case against Mr. Weaver, a sufficient case. Then Doris Black, of course, gets up with every witness and yells and hollers and in some cases intimated or mocked, humiliated, had one of them crying, Jean Henson, had Chris Coslick a nervous wreck. These are just ordinary people. They happened to be in the wrong place at the wrong time; and because of that, they were called as witnesses in this case. You think they enjoy coming to a trial where a man is on trial for cold-blooded murder with the death penalty in the picture? You think they wanted to come into this courtroom last week? You know better than that. They came because they saw what they saw and they did the best they could. They were subjected to what I would call abuse, but that's your decision whether you think it would be unfair treatment.

MS. BLACK: Objection. The Court would have reprimanded me if I was abusing the witness. The Court had the direct authority to direct me not to question them a certain way.

THE COURT: This is argument, Ms. Black. I'll overrule the objection.

[65] MR. WESTFALL: But as the case unraveled. I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreens you have. So the last day or two, I've been concerned what impact is this having on the jury?

Well, last night when I'm trying to decide exactly what I'm going to say to you and

I cleared all the smoke away and all the harangue and all the noise, you're left with nothing more than the facts. I have nothing to be afraid of unless you people heard something different than I heard. The only idiocy that you heard in this trial was Mr. Weaver's defense. If you want to hear about a cock and bull story, what he was doing out there on July the 6th with Leslie Cunningham is nonsense. If that were the State's case, I'd say you shouldn't even deliberate. Let him go in five seconds; because that wouldn't convince anybody of anything, his story is so ridiculous. And we'll get to that.

(Tr. 1647-50) (emphasis added). The same arguments continued as follows:

Joe Collins told you he took about 8 or 9 photos, some of which were introduced in evidence, some weren't; but they were all made available to Ms. Black and myself. The pertinent ones - - there's the tennis shoe, State's Exhibit 16, on the hill. You can't see the fence and trees, but you know it's there. He's not lying about where he took it. And she's got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she's going to suggest that was taken at nighttime as opposed to bad exposure, if you want to by that boldness - -

MS. BLACK: Your Honor, I want to object to the term "bold". We're supposed to be professional here and that connotation, as the Court knows, is an obscene connotation.

THE COURT: Overruled.

(Tr. 1658) (emphasis added). The attack on counsel continued:

> That proves it was a plant, yeah. To whom it would prove it, I don't know, except to Doris Black, assuming you believe she's convinced of it. These are just a sequence of police photographs trying to show you with moving things around what was on the floorboard of that car.

[66](Tr. 1664) (emphasis added).

* * * *

> Now, compare the State's case. Before I even get to this case, do you know what a remarkable series of coincidences you have to have here for William Weaver to be innocent and yet to find himself in this jam? He's out there to meet his lover. And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the hero this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroin [sic].

(Tr. 1665) (emphasis added). Next, Westfall argued:

> If they wanted to frame William Weaver, why didn't they take his tennis shoes, if he had

> some, and stick it in the mud and come and back and give you a picture of Weaver's? Of course, if they did that, Doris Black would say it's a frame. If they came in and said there was an oral confession, she would say it was beaten out of him. It was a frame. Why didn't they hand him a glass of water at the police station, let him drink it and, when he's finished with it, take a fingerprint off of the glass and come in and say they got it off the windshield of the Oldsmobile. If they wanted to frame him, they could do that. Of course, then she'd say it's a frame. She planted the word "frame".

(Tr. 1669-70) (emphasis added).

* * * *

> Nothing blossomed. Nothing developed. All her haranguing, all her yelling, when you wipe the smoke away, you've got nothing left except the facts.

(Tr. 1670) (emphasis added).

* * * *

> There was no love affair, at least not that morning, and perhaps not at all. He wasn't there to meet Leslie Cunningham and she wasn't endorsed until about five days before this trial, even though it was scheduled three months ago, has been pending for a year. It's all a big lie.

(Tr. 1671) (emphasis added).

During initial penalty phase Westfall continued:

> The State's case - - the evidence in this case once you threw out all the smokescreens and evaluated his perjury that his people put on, his guilt was obvious and you arrived at that verdict. Don't second-guess your verdict. I mean I think you should be offended by the fact that he's still maintaining his innocence. It's obvious [67] why he's doing it. He wants you to second-guess your verdict and spare his life on that basis alone.

(Tr. 1757) (emphasis added).

All of these arguments portrayed defense counsel as having suborned perjury and fabricated Mr. Weaver's defense. The arguments here prejudicially impugned defense counsel's integrity. See Harris and Burnfin, supra.

C. Other Improper Arguments

Besides the two noted areas of improper argument, Westfall engaged in an assortment of other forms of improper argument. These assorted arguments, continued to remove reason from the sentencing decision.

Westfall was allowed to argue over objection, during initial penalty phase, matters lacking evidentiary support. In particular, Westfall argued that if Mr. Weaver had not run out of bullets, then he would have shot police officer Crain (Tr. 1762-64). Even though counsel objected there was no evidence to support the argument, Westfall told the jury that if witness Jean Henson had been jogging a short while later, then Mr. Weaver would have shot her (Tr. 1763).

Also, Westfall argued outside the evidence that the death penalty is a deterrent (Tr. 1778-79). In fact a study of Missouri homicides found that there was a lower homicide rate during periods when the death penalty was declared unconstitutional and that for periods when the death penalty was permitted the number of homicides increased as the number of executions increased (R. Tr. 60-61 Ex. 4 offer of proof. L.F. 38-58; Supp. L.F. 25-45). Westfall made this argument even though trial counsel filed a motion to preclude it and attached a copy of the study that found in Missouri the death penalty does not act as a deterrent to homicide (L.F. 38-58; Supp. L.F. 25-45).

In an effort to intentionally mislead lead the jury during initial penalty phase, Westfall argued:

> But give the other message to the Gardiners of the world. He's chasing a - - it's a shooting case. His life was on the line. You want to tell him that for this kind of crime the guy goes to prison? <u>There are other crimes the life without parole is appropriate for that are less serious than murder</u>. I mean there are a number of crimes where somebody should spend the rest of their life - -
>
> [68] MS. BLACK: Your Honor. there is no other crime that life without parole would apply to. It is only Murder First Degree.
>
> MR. WESTFALL: <u>Judge, I'm giving my opinion, not stating what the law is</u>.
>
> MS. BLACK: It's a misstatement - -
>
> THE COURT: Sustained.

> MS. BLACK: I ask the jury be instructed to disregard that statement.
>
> THE COURT: The jury will disregard the statement stating there are other crimes for which life without parole is the punishment. You may proceed.

(Tr. 1766-67) (emphasis added). Courts having recognized that even when objections are sustained to especially improper prosecutorial arguments, reversal is still warranted. See Robinson v. Maynard, 829 F.2d 1501, 1511-12 (10th Cir. 1987) (discussing decision of state court in Scott v. State, 649 F.2d 560 (Okla. Cr. 1982)). Westfall's argument that constituted his "opinion" and not the law coupled with all his other improper arguments, likewise, requires reversal.

Westfall also argued he could have presented matters outside the evidence. In particular, Westfall argued, without objection, that he could have presented victim impact evidence through Mr. Taylor's wife, relatives, and friends (Tr. 1758).

The penalty phase argument, without objection, advanced imposing death in order to further the "War on Drugs" and described the jurors' need to protect the community through voting for death (Tr. 1759, 1768, 1776-77, 1779, 1781). Recent decisions have condemned closing arguments intended to appeal to jurors' passions and prejudices, urging them to convict to further The War on Drugs. See United States v. Johnson, 968 F.2d 768 (8th cir. 1992); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991). In Solivan, the Sixth Circuit reasoned that the amelioration of societal woes surrounding the drug problem is too heavy a burden for an individual defendant to bear. Solivan, 937 F.2d at 1153. This Court should find that, by injecting The War on Drugs, Westfall appealed to the jurors' passions and prejudices and Mr. Weaver's death

sentence resulted. Cf. Newlon v. Armontrout, 885 F.2d at 1335-38 (injection of improper considerations required reversal of death sentence). Moreover, argument urging the jury to convict a defendant in order to protect community values, preserve civil order, or deter future lawbreaking is impermissible. United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984).

[69] All of the arguments above were as egregious as the arguments in Newlon and Storey. The trial court erred in overruling defense counsel's objections. Further, as to those arguments for which there was no objection, they resulted in manifest injustice. In the alternative, reasonably competent counsel under similar circumstances would have objected to these improper arguments for which there was no objection and Mr. Weaver was prejudiced because they produced a conviction and sentence based on caprice and emotion. Even when an instruction to disregard was given, it was inadequate to cure Westfall's improper arguments. finally, Westfall's arguments independently constituted prosecutorial misconduct. This Court should reverse Mr. Weaver's conviction or at a minimum order a new penalty phase.